92-1762

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

AUGUSTUS J. SIMMONS,

Petitioner,

v.

EMIL H. FRANKEL, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

AUGUSTUS J. SIMMONS,
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QUESTION PRESENTED

Whether the "taking" of the Petitioner's land by the Federal Aviation Administration and the United States Army Corps of Engineers, in concert with the Connecticut Department of Transportation, without due process or the payment of just compensation for a period of thirty (30) years violates the Fifth and Fourteenth Amendments of the Constitution of the United States thereby giving rise to a cause of action under 42 U.S.C. § 1983?

LISTING OF PARTIES

Petitioner:

Augustus J. Simmons, Landowner

Respondents:

Emil H. Frankel, Commissioner
Connecticut Department of Transportation
Barry L. Harris, Administrator
Federal Aviation Administration
Lieut. Gen. Henry J. Hatch, Chief Engineer
United States Army Corps of Engineers
John J. Bartizek, District Clerk
Metropolitan District of Hartford
William P. Barr, Attorney General
United States Department of Justice
Richard Blumenthal, Attorney General
State of Connecticut
Lt. Col. John J. Collins, Administrator
Connecticut Air National Guard
* Julia Dicocco Dewey, Esq.
Connecticut State Attorney's Office
** Richard Palmer, Esq.
U. S. Attorney's Office

There is no parent or subsidiary company to be listed.

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* designated by Second Circuit Court of Appeals

** designated by Second Circuit Court of Appeals

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Augustus J. Simmons, respectfully prays that a writ of certiorari issue to review the unreported order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 23, 1993.

OPINION BELOW

The District Court judgment dismissing the complaint dated July 13, 1992 is printed at Appendix B, infra, and the order of the United States Court of Appeals for

the Second Circuit dated February 23, 1993 is printed at Appendix A, infra, and is not officially reported.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on February 23, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 and under Rule 17.1 of the United States Supreme Court rules.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Amendment V, Constitution of the United States

" . . . Nor shall private property be taken for public use, without just compensation."

Amendment XIV, Constitution of the United States

" . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

The Administrative Procedures Act 5 U.S.C. § 701 et seq. 5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States; provided, that any mandatory or injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

On December 15, 1960, petitioner Augustus J. Simmons was in receipt of a letter from the Department of Aeronautics of the State of Connecticut wherein the State,

in conjunction with the federal government, entered into an agreement in 1955 for the acquisition of land for "doolittle clear zones" of both ends of Runway 6-24 at Bradley International Airport located in northern Connecticut. A portion of petitioner's land is located in the doolittle clear zone and was, starting in 1962, invaded and appropriated by the federal agency, Federal Aviation Administration (F.A.A.), with the erection of permanent navigational instrumentation on the surface of the property to control air traffic in and around the navigable airspace of the airport.

Starting with February 28, 1962, service was made upon Anastasia Simmons, mother and predecessor in title, of a condemnation of certain real property to be used for federal instrumentation, without compensation or deposit with the court. In retrospect, even though the procedures used by the state agency were, in due course, ruled illegal, null and void, it served the purpose and the means by which the federal agency (F.A.A.) was able to engage in "major federal action" with the installation of permanent instrument landing system lights and thus begin the servitude imposed upon the landowner, without compensation – up to the present date.

The exclusive responsibility for air-navigation facilities and the surface upon which they were mounted is that of the federal agency (F.A.A.) under the authority granted under 49 U.S.C. § 1348 (b) and (d).

It has been the position of the United States that the clear zones, referenced in first paragraph as "doolittle clear zones," embrace navigable airspace which are within the sole jurisdiction of the federal government.

Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508a. See *United States v. New Haven*, 447 F.2d 972.

A second attempt at condemnation by the state agency in 1968 under statutes that were totally irrelevant to taking of property for airport purposes was also declared null and void in March, 1971. (160 Conn. 492). By judgment dated April 16, 1971 and recorded on the Land Records March 24, 1972 at Vol. 52, p. 242-243 of East Granby, Connecticut Land Records, all previously condemned properties of petitioner reverted, passed to and vested back to the owner – and again the owner was required to pay property taxes while the uninterrupted servitude by the F.A.A. continued unabated.

Almost simultaneously with the March, 1971 decision of the State Supreme Court referenced above was the enactment by the United States Congress in January, 1971 of the Uniform Real Property Acquisition Act, Title III (42 U.S.C. §§ 4651-4655). The effective date of this Congressionally mandated legislation was to be no later than July 1, 1972 after which section 305 (42 U.S.C. § 4655) shall be completely applicable to all states with the land acquisition procedures specified in § 4651 establishing uniform and equitable land acquisition policies for federal and federally assisted programs. Also, Connecticut General Statute 13b-50(d) clearly states all acquisitions financed wholly or partly with federal monies are to be done in the manner prescribed by the federal authorities, acting under the laws of the United States, and any rules or

regulations made thereunder, notwithstanding any other state law to the contrary. Thus, after July 1, 1972, it was implicit and mandatory that all acquisitions for airport purposes were to proceed under federal regulations and federal – not state – law.

Prior to the enactment of the Uniform Acquisition Act petitioner was instrumental in getting a special act passed by the Connecticut General Assembly to sue the state for damages over "loss of use of land" arising out of the bumbling condemnation proceedings. On January 5, 1970, petitioner Simmons brought such a suit, docket no. 163875 (Simmons v. Wetherell). The Connecticut Department of Transportation, in order to be in compliance with the mandates of the Uniform Real Property Acquisition Act were instrumental in having the Connecticut General Assembly enact legislation (C.G.S. 48-17a, b, c) that corresponds to the special act of the petitioner. Since neither the state nor the federal agency have acquired a "satisfactory property interest" as defined in (14 C.F.R. 152.1), no damages have been resolved.

The servitude by the federal agency, F.A.A., against the landowner after the aborted second condemnation of 1971 resulted in the federal agency entering into private leasehold interests with the Connecticut Department of Transportation without payment of compensation to the state agency or the owner, without any recording on the Land Records, notwithstanding that 42 U.S.C. § 4628 of the Uniform Acquisition Act controls: "whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of this act, be deemed

an acquisition by the federal agency having authority over such program or project."

The fact that the federal government possesses exclusive jurisdiction over the airspace and possesses illegal and fraudulent leasehold interests to the real property upon which its navigational instrumentation is located makes the United States an indispensable party to the litigation and subject to review action as permitted by 5 U.S.C. 701 et seq. and the upholding of the dismissal by the Second Circuit Court of Appeals is in direct conflict with *City of Atlanta v. United States*, 531 F. Supp 506.

The public policy of the Connecticut Department of Transportation for real property acquisition process for transportation projects was submitted to petitioner by James Lewis, Director, Office of Rights of Way, and reads: "Title search activities are normally completed during the preliminary engineering phase of a project to ascertain ownership of the land to be acquired. The rights of way phase of the project normally begins with the preparation of appraisals on all property to be acquired. This is followed by negotiations with affected owners, acquisition of title via a deed or condemnation, and relocation of displaced individuals prior to construction of the project."

Two executory contract meetings were held for the sale of land, the first on December 13, 1977 and the second on January 4, 1978 without any appraisals being submitted or any reference to damages and each was repudiated, disaffirmed within twenty-four hours for reasons of fraud, duress, lack of appraisals, concealment of leasehold interests granted by the sponsor to the federal

agency of the subject property, failure to make the federal agency a party to the action, and, failure after two botched condemnations to make an assessment of damages – prior to the acquisition of title. The INTENT was obvious to circumvent the public policy of regulations and guidelines mandated by the Uniform Act and the policy and guideline of the Connecticut Department of Transportation – as submitted to petitioner. After the first executory meeting of December 13, 1977, petitioner requested withdrawal of counsel on December 22 and 23, both verbally and by memorandum and appeared on January 4, 1978 with new counsel, but, new counsel was not permitted to represent petitioner.

Notwithstanding the repudiation and disaffirmance the second time via a certified letter and in person, a "closing" was still scheduled for April 19, 1978 with a court reporter present and a witness for petitioner, not realizing a reporter would be present. A portion of proceedings held on April 19, 1978 at offices of Rogin, Nassau, Caplan, Lassman and Hirtle with court reporter William G. Crampton reads:

Mr. Hirtle: Mr. Simmons, as I understand it, you don't want to proceed further with the closing, is that correct?

Mr. Simmons: Bob Hirtle, I have the highest respect for you. Just like I sent you the letter, I have the highest and utmost respect for Referee Shapiro and I further qualified it by saying that I am not going to be a party to any deal which is going to be coming out and being made public whereby the Rogin firm and my good friends here, David Salzman and Steve, who I have been very prone to

pick on. It is just not fair to everybody to have this kind of an arrangement and I am not going to be a party to it. What the State is attempting to do here is to say okay, let's date this thing back so their skirts are clean. They want me to go back and do battle with the Town over taxes and I say bullshit to that. We are going to clear that matter up before there will be any goddamned closing. We are going to get that cleared up and they are going to be open and above board. Hell, it is everybody and I'm telling you, everyone at the table, everything is going to be above board and no dealing is going back to November of '64.

Mr. Hirtle: You will not sign a deed today to consummate the closing, is that what I understand?

Mr. Simmons: Because the agreement states and I have to say if any portion of it is a nullity then it is all a nullity and I am not going to be a party to anything that is a nullity.

Mr. Neusner: Is that a definite negative answer?

Mr. Hirtle: You are instructing counsel not to proceed with the closing because you consider it to be a nullity?

Mr. Simmons: I am going to answer you, Bob, by saying that I sent you a certified letter expressing my position and when I talked to you on the phone, I said to myself, at least I am going to give them the courtesy of putting in an appearance today. I think that is a sufficient answer.

Mr. Hirtle: So I am not to proceed to closing and you will not sign the deeds today?

Mr. Simmons: That is correct.

Mr. Hirtle: And the meeting is adjourned.

(Whereupon at 11:44 a.m. the closing was adjourned.)

Appearances: Augustus (Ozzie) Simmons; John Kataja, witness; David Salzman, Esq.; Stephen Silverman, Esq.; Dennis Ceneviva, Esq.; Robert L. Hirtle, Esq.; present also was Edward Rogin, Sr., Esq. but not listed.

On June 2, 1978, without any proceedings being instituted by any state or federal agency, without service of process on any parties, Referee Shapiro proceeds under *Simmons v. Wetherell,* #163875, petitioner's private damage action to state that the real property now belongs to the State of Connecticut and terms his edict a "Supplemental Judgment." Placed on the Land Records on June 5, 1978 over the caption of *Simmons v. Wetherell* #163875 was the edict of Referee Shapiro listing various encumberers, but not the owner, with a return day of the first Tuesday of July, 1978 that was never returned to court for subject matter jurisdiction as no proceedings were ever instituted.

In a subsequent proceeding in State Court on June 7, 1982, again, under the caption of *Augustus J. Simmons v. Wetherell,* #163875, just compensation was foreclosed to all lien and mortgage holders who by statute (C.G.S. 48-21) must be compensated before the owner receives any compensation and cannot be considered for any compensation as process of service was never made on any parties.

[Excerpt from transcript before Hon. A. Dupont, Judge, June 7, 1982]

Victor Feingold, Esq., Assistant Attorney General, page 15-16.

"Now, I have previously furnished to your Honor, a certified copy of the complaint from Mr. Simmons pending in the United States District Court. This morning Attorney Bass is present on his motion, and I do not know if he has actual or constructive knowledge of the fact that there is pending in the United States District Court, a very important civil action, in Part A, Civil Rights Action, which if tried to conclusion could very well result in a judgment for Mr. Simmons that the State Court proceedings violated his rights. I am speaking of the State Court proceedings that led to the judgment on stipulation. Now, using that as a piece of evidence, I cannot, in good conscience, ever or anticipate that Mr. Simmons would ever deliver to the State a deed of the specific land within the stipulation for the agreed-upon price. If he will not deliver the deed, and there is no deed of Mr. Simmons in the custody of the court for delivery to the State, as there is money on deposit, then I cannot see why the State funds should be used to start paying his obligation and his bills, because that is all this thing amounts to. Well, to use this money to pay his bills where Mr. Simmons, himself, resisted it, quid pro quo, and has no intentions of ever delivering a deed to the State for the agreed-upon price.

Now, since this judgment on stipulation is defined by me, and I believe as a matter of law must be defined as an executory agreement for the sale of the land on an agreed-upon price, and unenforceable because of the statute of limitations, the Superior Court cannot entertain an action or specific performance on behalf of the State.

Well, the entire matter must be left for further proceedings in an effort to adjust the differences of the parties. The action for the judgment on stipulation cannot be characterized as an equitable claim. It is in no way a condemnation matter brought under any procedures of the State of Connecticut to condemn land for airport purposes or any other purposes."

On or about February 1, 1991, encroachment with erection of fences and removal of timber was made by the United States Army Corps of Engineers and the Air National Guard on a separate and distinct parcel from that upon which FAA appropriated for navigational instrumentation, without any contact with the owner, without initiating any legal procedures or making any title searches, without payment of just compensation. The dismissal of petitioner's complaint by the District Court and failure of the Second Circuit Court of Appeals to reverse and remand for further hearing is error, is contrary to the Fifth and Fourteenth Amendments of the Constitution, is in direct conflict with federal regulations as promulgated under the Uniform Act, continues to impose undue and prolonged hardship, and is in direct conflict with its previous reported decision of 1973 (472 F.2d 509).

REASONS FOR GRANTING THE WRIT

1. The opinion below reflects a widespread conflict with other jurisdictions, and this Court, concerning the availability and applicability of the Civil Rights Statute, 42 U.S.C. § 1983.

When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) as they are in the case at bar,

illuminating the fact that no proceedings were instituted or pending in the state or federal courts for land acquisition, and no just compensation has been paid by any state or federal agency for resolution of the servitude imposed by the federal agency(s) and Congress has assigned to the federal courts the paramount role to protect constitutional rights, *McNee v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961); the decision of the Second Circuit to not permit and avoid altogether the federal questions turns the principles of federalism on its head.

In all cases, the availability of the § 1983 remedy turns on whether the statute, 49 C.F.R., Part 24, by its terms or as interpreted, creates obligations, "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," *Wright v. City of Roanoke Housing Authority*, 107 S. Ct. 773-775 (1987), is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself." Id. at 107 S. Ct. 770-773.

Where Congress has amended the original regulations (Sec. 213 of the Uniform Act – 42 U.S.C. 4633) under public law 100-17-April 2, 1987 and the requirement that interested persons be given general notice of proposed rule-making changes and an opportunity for public comment before a "substantive regulation" is changed or promulgated was made, such action complies with Administrative Procedure Act (APA)'s requirements that petitioner is a person "adversely affected or aggrieved" by agency action, affording the right of judicial review of agency action to such a person.

Where the opportunity for public comment has been provided and the proposed regulations were printed in the Federal Register on April 14, 1983, and by Memorandum from the President of the United States, dated February 27, 1985, contained in the Federal Register at Vol. 40, p. 43, Tuesday, March 5, 1985, with the specific purpose to improve administration and implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, it directed the following actions:

1. The Presidential Memorandum of September 6, 1973 on this subject is superseded.

2. The Department of Transportation, D.O.T., is designated to coordinate and monitor implementation of the Act.

3. D.O.T., jointly with the Department of Housing and Urban Development, shall interact with the principal executive departments and agencies affected by the Act in developing administration policy.

4. Within 90 days of the date of this Memorandum, all affected executive departments and agencies shall propose common regulations under the Act. Within one year of the date of this Memorandum, such departments and agencies shall issue common regulations under the Act. Such regulations shall be consistent with the model policy promulgated by D.O.T., in consultation and coordination with other affected agencies, and published in final form in the Federal Register simultaneously with this Memorandum.

5. D.O.T. shall report annually to the President's Council on Management Improvement, through the Office of Management and Budget, on implementation of the Act.

Ronald Reagan

The White House
Washington, February 27, 1985

The fact that a federal statute has pre-empted certain state actions does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy. *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 at 449 (1989).

In *Ward v. Downtown Development Authority*, 867 F.2d 1526 (11th Cir. 1986) the court found that the fact that "the source of a property interest is state law does not render the deprivation of the property without due process any less a basis for § 1983 liability. The inquiry focused on whether state law provides the plaintiff with a legitimate claim of entitlement protected by the due process clause of the Federal Constitution. Since Appellant's entitlement might warrant protection under § 1983, the claim could not be dismissed, the court finding that the existence and extent of an entitlement to benefits can be determined only after a factual assessment of the feasibility of adequate relocation.

Where it appears that the United States, through the Federal Aviation Administration, is the owner of or is in the process of acquiring a navigational servitude by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit, the government lacked the authority to impose

such servitude without payment of compensation to the owner. It is a legitimate claim of entitlement protected by the Due Process Clause of the Federal Constitution and the substantive federal regulations promulgated thereto. *Colorado River Conservation District v. United States*, 424 U.S. 800 at 803; *Kaiser Aetna v. United States*, 444 U.S. 164 at 169; *United States v. Causby*, 328 U.S. 256; *Chrysler Corp. v. Brown*, 441 U.S. 281, 294-5, 99 S. Ct. 1705, 1713-1714, 60 L.Ed.2d 208 (1979).

Where it appears that the United States in a separate proceeding involving a separate parcel of real property, through the United States Army Corps of Engineers, who acted jointly and as part of a plan or conspiracy with the Air National Guard and the Connecticut Department of Transportation, is the owner of or is in the process of acquiring a real property interest for the Air National Guard, also a federal agency, by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit, the government lacked the authority to seize such real property without payment of just compensation to the owner. It is a legitimate claim of entitlement protected by the Due Process Clause of the Federal Constitution and the substantive federal regulations promulgated thereto. *Kaiser Aetna*, supra; *Chrysler Corp. v. Brown*, supra.

Where federal interests are "sufficiently implicated to warrant the protection of federal law" any rights should derive from a federal source. Where the federal government has the exclusive power to act, in those areas state action is precluded. If Congress has acted, as it has, the supremacy clause requires pre-emption of state law. To apply state law is virtually to nullify the federal objective.

Moreover, the Supreme Court in *Peacock v. City of Greenwood*, 1964, 384 U.S. 808, 86 S. Ct. 1800, 16 L.Ed.2d 944, clearly indicated that § 1983 was applicable when statutory, as well as, constitutional "rights, privileges, and immunities" were involved, the court said: "Under 42 U.S.C. § 1983 * * * the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal, constitutional, and statutory rights as well." 384 U.S. at 829-30; 86 S. Ct. at 1813; 16 L.Ed.2d at 958. See also *Sheridan v. Garrison*, 5th Cir. 1969, 415 F.2d 699 at 705-706.

Where appellant's federal court action under 42 U.S.C. § 1983 charging denial of constitutional rights by a state agency may not be dismissed for lack of subject matter jurisdiction, unless it appears frivolous or wholly insubstantial, the dismissal sua sponte by Judge Dorsey and the upholding by the Second Circuit Court of Appeals without addressing the complaint was to both foreclose entitlements under Part 24 of 49 U.S.C. and any private enforcement under § 1983.

The question of whether § 1343(3) applies only if "personal" rights as opposed to "property" rights are allegedly impaired was made clear in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 at 542-543 wherein the court said: * * * This court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. Today we expressly reject that distinction. Neither the words of § 1343(3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of §§ 1983 and 1343(3) seems clearly to have intended to provide a

federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.

The Uniform Relocation Assistance and Real Property Acquisition Act and the Department of Transportation regulations promulgated in accordance with its mandate make acquisition of such property for major federal action projects a federal agency responsibility. Section 208 of the Relocation and Real Property Acquisition Act sets out the requirements. 42 U.S.C. § 4628. In relevant part it states: Whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of this Act, be deemed an acquisition by the federal agency having authority over such program or project.

It is respectfully submitted that this important issue of the availability of a private right of action under the transportation laws and regulations, coupled with the direct conflict among the circuits compels the allowance of the writ sought herein.

2. The opinion below reflects a widespread conflict with other jurisdictions, and this court, concerning the due process and just compensation clauses of the Fifth and Fourteenth Amendments.

Where the navigational servitude was imposed by a federal agency, Federal Aviation Administration (F.A.A.) by invading, appropriating and installing navigational instrumentation on the surface of the property and

adopted takeoff and landing procedures for public, private, and military aircraft in the navigable airspace relating to such primary runway, such activity constitutes "major federal action" by the F.A.A., is analogous to *United States v. Causby*, 328 U.S. 256, mandating an assessment of damages.

The establishment, operation, and maintenance of the various air navigation facilities by the F.A.A. who are charged by law with jurisdiction over the acquisition and the air traffic rules, see 49 U.S.C. § 1348, and any use of the runway without F.A.A. permission would violate federal law.

Existing regulations, 14 C.F.R. § 152 (1990) and conditions in the federal Airport Development Aid Program (ADAP) grant-agreement require that construction may not begin on any airport development project unless such development is shown on an approved airport layout plan. F.A.A. approval of airport layout plans is required before airport development projects may proceed. *Town of New Windsor et al v. Ronan*, 481 F.2d 450 (Second Cir. 1973). This is true even where federal assistance is not contemplated. The reporting and the actions of the Second Circuit Court of Appeals relative to runway lights and a "middle-marker" in the case at bar, (472 F.2d 509-1973) was in direct conflict with *Town of New Windsor*, supra, in the same year, 1973, by the same jurisdiction, and continues to be in direct conflict with other jurisdictions, particularly *City of Atlanta v. United States*, 531 F. Supp. 506, 1982. The states lack the power under the commerce clause to sanction any such form of servitude.

In *United States v. Causby*, 328 U.S. 256, a landmark decision wherein this court characterized the low overflights over a chicken farm as being similar to an invasion of the surface, the court found the government liable for damages. In *City of Atlanta v. United States*, supra, the court found under stipulations of fact the administrator of F.A.A. is responsible for the regulation of the use and management of the navigable airspace of the United States and the establishment, operation, and maintenance of air navigation facilities.

The F.A.A., having made entry upon private property in 1962 with the erection of permanent lighting standards, claims a right to continue to impose the navigational servitude upon the landowner through a leasehold interest, not from the owner, but, from the sponsor of the airport with "claimed" rulings from the courts that they do not have to pay rent or compensation, of any nature, for the servitude imposed upon the private landowner.

The writ of certiorari should be granted due to the Appeals Court (Second Circuit) changing courses from its reported decision of 1973 (472 F.2d 509). The facts have remained the same, namely, no institution of proceedings and no payment of just compensation by either the federal or state agency. The most recent unreported opinion continues undue and severe hardship upon the landowner with a "double whammy," forcing the owner to pay interest on liens and mortgages against the property in lieu of acquisition of a satisfactory property interest – for decades.

The challenge by the landowner that the course of conduct of the F.A.A. effected a taking of petitioner's

property - is undisputed. The permanent structures put upon the surface of the property and the control of air traffic resulted in the taking of a servitude. The failure to pay just compensation or damages has also been acknowledged.

The colloquy of the Asst. U.S. Attorney, George J. Kelley, Esq. before Hon. Jose A. Cabranes, District Judge on February 24, 1982 in a transcript at pages 25-26 regarding compensation states:

Page 25, Mr. Kelley: "Your Honor, I would comment only that the AADA, which I understand to be the Airport and Airway Development Act of 1970, that is codified at 49 U.S. Code, Section 1701, et seq. that the AADA that Mr. Simmons refers to is a different statute than the one which I have briefed and that it, in fact, does not apply to the facts of this situation.

There was no expenditure of federal funds under the AADA to permit the taking of any of the property involved in this case, to my knowledge. Therefore, without seeing the case that Mr. Simmons relies on, I would just submit that the AADA as a separate statute concerning airport development does not apply to this action."

Page 26. Mr. Kelley: "Your Honor, it is my understanding that the land that's in question here, the parcels of land on which there may be certain instrumentation landing system equipment, was not obtained by funds provided by F.A.A. under the AADA. That is my understanding of the situation. As far as the rest of Mr. Simmons' comments in response to my motion to dismiss, I would simply stand on the memorandum as we filed it."

INTENT

The Due Process clause imposes substantive limitations on state actions, limitations that extend to intentional and malicious deprivations of liberty and property even when compensation is available under state law.

Where the Connecticut Department of Transportation had the Connecticut Legislature enact legislation (48-17a, b, c) to be in accord with the Uniform Act relative to damages and where state law, preceding the Uniform Act, required appraisals before taking private property for public use to determine the true value of property, is still the law today, the intent was and still continues to be to circumvent the requirements of the prerequisite to any negotiations, mandated by § 4633.

Where the F.A.A. has entered into leasehold interests of petitioner's private property with a sponsor who never acquired any such interests from the owner, the intent was to shelter or shield itself from lawsuits under inverse condemnation or § 1983 actions.

The fact that the F.A.A. acquired a satisfactory property interest at the Groton-New London State Airport and never attempted to acquire a similar interest, for similar instrumentation at the State's premier airport, at the same corresponding period of time, connotes an intentional as opposed to negligent, unequal application of 49 U.S.C. § 1348.

Where the Supreme Court ruled a taking in overflights over a chicken farm with damages to be assessed in *United States v. Causby*, (328 U.S. 256) was analogous to

an invasion of the surface and the invasion and appropriation in the case at bar by F.A.A., and more recently by the United States Army Corps of Engineers, without paying for the privilege of doing so, and thirty years later the owner still has not been compensated, the intent of the federal agency(s) has been deliberate as opposed to negligent, that the legal duty created by 42 U.S.C. § 4633 falls on the "head of a federal agency," in this case, the Administrator of F.A.A. and the Chief Engineer of the United States Army Corps of Engineers.

The petition for a writ of certiorari should be granted because of the importance of the issue and a conflict concerning the scope and nature of the navigational servitude involving several federal and state agencies over an extended period of years.

3. The decision below is incorrect.

It is unmistakable from the plain language of § 4655 that the states (AND THE FEDERAL AGENCIES) must comply with the land acquisition procedures specified in § 4651 that will "result in" the acquisition of real property.

The legislative history of the Act makes very clear that it is immaterial whether . . . federal funds contribute to the cost of the property. The controlling point is that the real property must be acquired for a federal or federal financially assisted program or project. H.R. Rep. No. 91-1656, 91st Cong. 2d Sess. (1970), reprinted at 1970 U.S. Code Cong. & Admin. News 5853. The Court of Appeals for the Fourth Circuit in *City of Columbia, S.C. v. Costle,*

710 F.2d 1009 (1983) found in relevant part those provisions require the grant recipient to attempt to acquire the real property interest through negotiations with the landowner, during which the grant recipient must offer the landowner the full appraised value of the interest.

Clearly, the opinion of the Second Circuit, as expressed, is to circumvent the public policy promulgated, which is error, and the reliance on *Simmons v. Wetherell*, #163875, a private damage action of petitioner, in lieu of proceedings being instituted by defending federal and state agencies – is in complete derogation of the Due Process clause of the Fifth and Fourteenth Amendments and represents conflicts with every other circuit, including *Noble v. Union River Logging R.R.*, 147 U.S. 165, cited by petitioner.

Where appellant has raised federal questions (as to the merits of which no opinion is expressed) which are important to the public as well as to litigants, the issue of state law versus federal law is certain. The Connecticut courts have recognized that federal regulations are preemptive and in *New Haven v. East Haven*, 35 Conn. Supp. 157 at p. 170 (1977) made clear the airport, BY FEDERAL REGULATIONS, is authorized to acquire land to maintain airport approach zones, including clear and transition zones (14 C.F.R. 152.85(d) (1977). Where no proceedings under federal or state law were instituted it is error for the Appeals Court to give credence, comity to a nonexistent state court action. From 47 Am. Jur. 2d Judgments §§ 752, 753, "It is an acknowledged principle of . . . every court in the world, that not only the decisions, but everything done under the judicial process of courts not having jurisdiction, are ipso facto void." *Martin v. Hunters Lessee*,

14 U.S. (1 Wheat) 304, 364, 4 L.Ed 97 (1816); *Chrysler Credit Corp. v. Fairfield Chrysler-Plymouth, Inc.*, 180 Conn. 223, 229, 429 A2d 487 (1980); *Marshall v. Clark*, 170 Conn. 199, 205, 365 A2d 1202 (1976).

The relevant principles of equity, comity and federalism "have little force in the absence of a pending state proceeding." *Lake Carriers Assn. v. MacMullan*, 406 U.S. 498, 509 (1972).

The critical point of departure by the Second Circuit from the Supreme Court's decision in *Lynch v. Household Finance Co.*, 405 U.S. 538, is a judgment entered without the parties, without proceeding under a court order and without the service of summons at all, notwithstanding that federal law and regulations were controlling and applicable to petitioner's legitimate claim of entitlement protected by the due process clause of the Federal Constitution.

In *Port Chester Yacht Club v. Jasillo*, 614 F. Supp. 318 (D.C.N.Y.), the court noted that if, after pursuing state remedial possibilities, the condemnee still believes that his property has been taken without due process of law, he may assert a § 1983 constitutional claim in Federal Court. Port Chester, supra, is under Second Circuit jurisdiction and where Congress has assigned to the Federal Courts the paramount role to protect constitutional rights, the decision of the Second Circuit to not permit and avoid altogether the federal questions – is error.

The Second Circuit's unreported opinion is contrary to the reported decision of this same court in 1973 (472 F.2d 509) wherein the facts remain the same, no proceedings instituted nor any compensation paid and is contrary

to the Supreme Court ruling in *Abdo Ahmed Nagi v. United States*, 751 F.2d 826 (1985), wherein the court ruled that the mechanical interpretation and application of the regulations runs counter to the Congressional objectives of the statutes, thus violating the spirit and intent of that portion of the Uniform Act (42 U.S.C. §§ 4651-4655).

The Second Circuit's unreported opinion with reference to and reliance upon a judgment of Referee Shapiro who was not acting pursuant to a court order or under a court's authority is contrary to this court's ruling in *Fuentes v. Shevin*, 407 U.S. 67, wherein this court found the statutory procedures violate the Fourteenth Amendment's guarantee that no state shall deprive any person of property without due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Second Circuit Court of Appeals on this issue.

Respectfully submitted,

/s/ Augustus J. Simmons
AUGUSTUS J. SIMMONS, Petitioner
P. O. Box #1
Windsor, CT 06095
(203) 569-6714

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held that the United States Courthouse in the City of New York, on the 23rd day of February, one thousand nine hundred and ninety three.

Present:

Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Circuit Judges

Honorable Charles L. Brieant,
*Chief District Judge**

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant

v.

ORDER
No. 92-6208
(Filed Febr. 23, 1993)

EMIL H. FRANKEL., Commissioner of Transportation, BARRY L. HARRIS, Administrator, Federal Aviation Administrator, HENRY J. HATCH, General Chief Engineer U.S. Army Corps. of Engineers, JOHN J. BARTIZEK, District

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* Chief Judge Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

Clerk, Metropolitan District Commission., UNITED STATES OF AMERICA, STATE OF CONNECTICUT, JOHN J. COLLINS, Lt. Col., Administrator, FAA,

Defendant-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came to heard [sic] on the transcript of record from the United States District Court for the District of Connecticut (Dorsey, *J.*) and was argued by appellant, while counsel for appellees relied on their submissions.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is AFFIRMED, and appellant is assessed double court costs.

Augustus J. Simmons, *pro se*, appeals from an order of the United States district Court for the District of Connecticut (Dorsey, *J.*), dismissing his complaint *sua sponte* and ordering Simmons to pay $2000 in fines.

On June 5, 1992, Simmons brought an action, pursuant to 42 U.S.C. § 1983, alleging various constitutional violations arising from Connecticut's acquisition of land owned by Simmons. the district court concluded that Simmons was attempting to reassert federal constitutional and statutory claims that were fully adjudicated in prior proceedings in violation of an injunction issued against him, and dismissed his complaint *sua sponte* on July 14, 1992. The court also ordered Simmons to pay

fines in the amount of $1000 to the State of Connecticut and $1000 to the United States.

The long history of this litigation began in 1964, when the State of Connecticut attempted to condemn property in East Granby, Connecticut, then owned by the Simmons's family, to expand what is now the Bradley International airport. Simmons filed various state and federal actions, later consolidated in Connecticut Superior Court, alleging that the State illegally occupied portions of his land and challenging the State's attempt to gain title to the property. On January 4, 1978, a judgment was entered, pursuant to a stipulation between the parties, providing that the State would take title to certain parcels of Simmons' land, in return for which the State would pay Simmons $385,000. The stipulation further provided that the "judgmenet entered in this matter [shall] be a full and final settlement between the parties of any and all claims contained in the above consolidated cases." However, six months later Simmons moved to open the judgment claiming ineffective assistance of counsel. This request was denied and the denial was affirmed on appeal. *Simmons v. Wetherall*, 180 Conn. 587 (1980) (per curiam).

Not dissuaded by the final judgment granting title of the disputed real property to the State of Connecticut, Simmons continued to pursue the issue. Simmons filed seven state and five federal proceedings after the 1978 stipulation was certified. Then in a 1988 order, Judge Cabranes enjoined Simmons from filing "any state or federal claims in any federal court against any of the defendants named in the complaint in this lawsuit if such lawsuit related to his alleged ownership" of the disputed

real property. Affirming judge Cabranes's order in all respects, this Court warned that any violation of that injunction could be punished as contempt of court and imposed double court costs against Simmons. *Simmons v. Burns*, No. 88-6093 (2d Cir. Oct. 5, 1988) (unpublished summary order).

Despite this Court's attempt to stem the flow of vexatious litigation by Simmons, we are confronted once again with an attempt by him to litigate a matter barred by res judicata. Notwithstanding Simmons's attempt to circumvent the injunction by changing the named defendants, the instant complaint clearly relates to Simmons's ownership of the East Granby land. Thus, Simmons has violated Judge Cabranes's injunction. Furthermore, even without the injunction, Judge Dorsey's dismissal of the complaint *sua sponte* would be affirmed based on res judicata grounds.

Both the state and federal defendants have asked the district court to impose sanctions on Simmons in order to deter him from continuing his attempts to reopen this litigation. *Pro se* litigants are subject to sanctions under Fed. R. Civ. P. 11. *See Maduakolam v. Columbia Univ*, 866 F.2d 53, 56 (2d Cir. 1989). Furthermore, this Court has not hesitated to impose sanctions on *pro se* litigants when they become particularly vexatious. *See Sassower v. Field*, 973 F.2d 75 (2d Cir. 1992) (upholding sanction of $93,350 against vexatious plaintiff).

The district court's order dismissing *sua sponte* Simmons's complaint and imposing $2,000 in fines is hereby

AFFIRMED. Furthermore, we hereby assess double court costs against Simmons pursuant to Fed. R. App. P. 38.

/s/ John Walker
Hon. John M. Walker, Jr.,
U.S.C.J.

/s/ Joseph M. McLaughlin
Hon. Joseph M. McLaughlin,
U.S.C.J.

/s/ Charles Brieant
Hon. Charles L. Brieant,
U.S.D.J.

N.B. *THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.*

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of February, one thousand, nine hundred and ninety three.

Present:

Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Circuit Judges,

Honorable Charles L. Brieant,
*Chief District Judge.**

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant,

v.

ORDER
No. 92-6208
(Filed Febr. 23, 1993)

EMIL H. FRANKEL, Commissioner of Transportation, BARRY L. HARRIS, Administrator, Federal Aviation Administrator, HENRY J. HATCH, General, Chief Engineer U.S. Army Corps. of Engineers, JOHN J. BARTIZEK, District Clerk, Metropolitan District Commission., UNITED STATES OF

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*Chief Judge Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

AMERICA, STATE OF CONNECTICUT,
JOHN J. COLLINS, Lt. Col.,
Administrator, FAA,

Defendant-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came to heard on the transcript of record from

Dismissed sua sponte.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS	)	2:92 CV 00395 PCD
VS.	)	
	)	
EMIL H. FRANEL, et al.	)	

JUDGMENT

(Filed July 13, 1992)

The action having come on for consideration of the plaintiff's complaint before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Order, dismissing the complaint as violative of the 1988 injunction,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut this 13th day of July 1992.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS	:	Docket No.
-vs-	:	2:92cv00395 (PCD)
EMIL H. FRANEL, et al.	:	(Filed July 8, 1992)

ORDER

The claims asserted in Mr. Simmons' most recent complaint pertain to his claim of title and interest to or in three parcels of land n [sic] East Grandby, Connecticut, adjacent to Bradley International Airport. Although the defendants are changed – for example, Emil Frankel only recently became Connecticut's Transportation Commissioner – the heart of the controversy remains the same. This case thus asserts the same rights Mr. Simmons has repeatedly asserted in various lawsuits filed during the past decade, despite the Connecticut Supreme Court's final determination that he no longer retained any rights to the land in question, *Simmons v. Wetherall*, 180 Conn. 587 (1980), and despite an injunction issued in 1988 prohibiting him from filing such actions without first obtaining permission from this court. *Simmons v. Burns*, Civil No. H-87-732 (JAC) (D. Conn. Mar. 15, 1988), Ruling on Pending Motions and Order. Mr. Simmons fails to accept the fact that he may not attempt, over and over again, to retry his claims to the land, even in the face of the Court of Appeals' warning that such repeated attempts would result in sanctions. *Simmons v. United States*, Docket No. 85-6087 (2d Cir. Nov. 22, 1985).

The time has come to put an end to Mr. Simmons' vexatious, annoying and unjustified attempts to re-litigate claims which have been finally decided for over a decade. Thus, it is hereby

ORDERED that the complaint be dismissed as violative of the 1988 injunction; and it is further

ORDERED that Mr. Simmons may file, on or before July 24, 1992, any pleading showing why he should not be ordered to pay the sum of $1000 to the State of Connecticut, and an additional $1000 to the United States, as sanctions for the filing of this frivolous lawsuit.

Dated at Hartford, Connecticut, this 8th day of July, 1992

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

WILLIAM BURNS, Commissioner, ALLAN McARTOR, Adm., FAA, ATTY, EDWARD ROGIN, JULIA Z. TASHJIAN, THOMAS P. BYRNE, CONNECTICUT NATIONAL BANK AND TRUST, JEROME DIAMOND, LEONIDAS D. SIMMONS, LEONARD ALLAIRE, MARIE ALLAIRE, PATSY VALENTE, ERNESTINE VALENTE, ANGELO RONCARI, ATTY. GERALD A. ROISMAN, JOHN J. ROWLSON, JOHN MASSOW, FLORENCE MASSOW, ALBERT ENDEE, JOHN KATAJA, ATTY. MARGARET DEAN, GERALD F. MIKULSKE, RONALD MUSKATALLO, ATTY. RONALD CASSIDENTO, STEPHEN SILVERMAN, ATTY. ROBERT HIRTLE, DAVID SALZMAN, FRANK ROTHAMMER, JOHN J. BARTIZEK and ROCCO D'ESTITO

CIVIL NO. H-87-732 (JAC)

FINAL JUDGMENT

This cause came on for consideration on plaintiff's motion for reconsideration of the Court's Ruling on Pending Motions and Order, filed March 15, 1988, before the Honorable Jose A. Cabranes, United States District Judge, and the issues having been duly reconsidered and a Ruling on Plaintiff's Objection to Court's Ruling of March 15, 1988, having been filed on May 16, 1988, denying motion to reconsider and dismissing all remaining claims against all remaining defendants, pursuant to Rule 11, Fed.R.Civ.P.,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of all remaining defendants (summary judgment having been entered in favor of defendants Burns, Comm., McArtor, Adm. of FAA, Rogin, Tashjian and Hirtle on March 16, 1988) dismissing the complaint.

Dated at New Haven, Connecticut, this 18th day of May, 1988.

KEVIN F. ROWE
Clerk, United States District Court

By .....
Deputy in Charge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges,

HONORABLE CON. G. CHOLAKIS,
*District Judge.**

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

J. WILLIAM BURNS, ET AL.,
Defendants-Appellees.

ORDER 88-6093

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

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* Hon Con. G. Cholakis, District Judge, United States District Court for the Northern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is AFFIRMED, and appellant is assessed double court costs.

1. We affirm for the reasons stated in the ruling of the district court. We also consider this a frivolous appeal. This is appellant's third appearance before this court in the past five years, and on each occasion res judicata barred or bars his reassertion of the same claims which were either fully litigated or should have been litigated in prior state and federal proceedings. In his last appearance before this court, *Simmons v. United States of America, et al.*, Docket No. 85-6087 (2d Cir. Nov. 22, 1985) (unpublished order), appellant Simmons was placed on notice that he risked imposition of sanctions should he seek to appeal the same matters again.

2. It is accordingly appropriate to assess double court costs against appellant pursuant to Fed. R. App. P. 38.

3. We specifically call to appellant's attention that we affirm the order of the district court in all respects, including its injunction against further federal litigation concerning these claims, and that any violation of that injunction may be punished as a contempt of court.

J. Edward Lumbard,
J. Daniel Mahoney,
Circuit Judges

Con. G. Cholakis,
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, ET AL

CIVIL H-85-45 MJB

JUDGMENT

This action having come on for consideration of the defendants' motions to dismiss before the Honorable M. Joseph Blumenfeld, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having granted the motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the plaintiff's complaint.

Dated at Hartford, Connecticut, this 10th day of April 1985.

KEVIN F. ROWE, *Clerk*

By: DENNIS P. IAVARONE
Deputy-in-Charge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of November, one thousand nine hundred and eighty-five.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

85-6087

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

We agree with the April 8, 1985, order of the district court dismissing appellant's claims on the ground of res judicata. We also consider this a frivolous appeal. Appellant has litigated the same matters numerous times before in both state and federal courts over a period of many years. Because appellant is a pro se litigant, we are not imposing sanctions at this time. However, appellant is hereby placed on notice that he risks imposition of sanctions in the future should he seek once again to relitigate these same matters.

WILFRED FEINBERG,
Chief Judge

WALTER R. MANSFIELD,
JAMES L. OAKES,
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in related cases before this or any other court.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of February, one thousand nine hundred and eight-four.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS,
Commissioner of Department of Transportation,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE, Secretary of United States Department of Transportation, FEDERAL AVIATION ADMINISTRATION, J. LYNN HELMS, Administrator, STATE OF CONNECTICUT, J. WILLIAM BURNS, Commissioner of Connecticut Department of Transportation and CONNECTICUT DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

No. 83-6257

A petition for a rehearing having been filed herein by plaintiff-appellant, Augustus J. Simmons, *pro-se,*

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, *Clerk*

by FRANCIS X. GINDHART,
Chief Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE, Secretary of United States Department of Transportation; FEDERAL AVIATION ADMINISTRATION; J. LYNN HELMS, Administrator; STATE OF CONNECTICUT; J. WILLIAM BURNS, Commissioner of Connecticut Department of Transportation

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AUGUSTUS J. SIMMONS

v.

ARTHUR B. POWERS, COMMISSIONER, DEPARTMENT OF TRANSPORTATION

No. H81-778
and No. 83-225

JUDGMENT

These consolidated actions having come on for consideration of the Defendants' Motions to Dismiss before the Honorable Jose A. Cabranes, United States District Judge; and,

The Court having considered the full record of the case including the applicable principles of law, and the Court having filed its endorsements on August 16, 1983, granting Defendants' motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in

favor of the Defendant dismissing the Plaintiff's complaints.

Dated at Hartford, Connecticut, this 24th day of August, 1983.

SYLVESTER A. MARKOWSKI,
Clerk, United States District Court

By .....
JOHN K. HENDERSON, JR.
Deputy in Charge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of December, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE JAMES L. OAKES
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS, etc.,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellee

No. 83-6257

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed as follows:

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport. It concerns two actions, filed by appellant in the United States District Court for the District of Connecticut, and directed against various state and federal defendants. The complaint in the first case, Civ. No. H-81-778, was filed in October 1981, and subsequently amended. On February 7, 1983, judge Cabranes granted the federal defendants' motion to dismiss. Simmons appealed, and this court, by order dated June 9, 1983, dismissed the appeal for lack of jurisdiction because the dismissal of the claim against the federal defendants did not constitute a final judgment of the district court. We stated that, to pursue the appeal, Simmons would have to seek the entry of a final judgment as to the federal defendants, or await the determination of the claims against the state defendants.

2. On March 22, 1983, appellant filed the complaint in the second case, Civ. No. H-83-225. On May 23, 1983, Judge Cabranes granted a motion by the State of Connecticut to consolidate both cases. On August 16, 1983, Judge Cabranes dismissed the complaints in the consolidated actions. Simmons now appeals from that dismissal. We agree with Judge Cabranes that the doctrine of res

judicata bars the reassertion of these claims, already litigated in state courts. Simmons v. Wetherall, 430 A.2d 1296 (Conn. 1980).

3. The judgment of the district court is affirmed.

WILFRED FEINBERG,
Chief Judge

HENRY J. FRIENDLY,
*JAMES L. OAKES,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,

Plaintiff.

v.

J. WILLIAMS BURNS, AS HE IS THE COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF TRANSPORTATION, AND J. LYNN HELMS, AS HE IS THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION

Defendants.

No. 81-778
Appeal No. 83-5141

PLAINTIFF'S MOTION FOR "FINAL DECISION" ON WITHHOLDING OF FEDERAL FUNDS FOR ALL AIRPORT DEVELOPMENT AT BRADLEY INTERNATIONAL AIRPORT
(Preliminary Injunction)

DENIED as moot, in view of the court's disposition of the case. *See* the court's endorsement order (filed Aug. 16, 1983) of the federal defendants' motion to dismiss and the court's endorsement order (filed Aug. 17, 1983) of the state defendants' motion to dismiss. It is so ordered.

JOSE A. CABRANES, U.S.D.J.

August 17, 1983, Hartford, CT

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, J. LYNN HELMS, Administrator, Federal Aviation Administration, STATE OF CONNECTICUT, CONNECTICUT STATE DEPARTMENT OF TRANSPORTATION, and J. WILLIAM BURNS, Commissioner, Connecticut State Department of Transportation

No. H 81-778

RULING ON THE FEDERAL DEFENDANTS' MOTION TO DISMISS

JOSE A. CABRANES, *District Judge:*

This procedurally convoluted action arises out of a dispute between plaintiff and various defendants concerning the use of several parcels of land in the town of East Granby, Connecticut. On November 8, 1982, plaintiff filed his third Amended Complaint, and on December 21, 1982 the federal defendants (the United States of America, the Federal Aviation Administration, and J. Lynn Helms as Administrator of the Federal Aviation Administration) filed a motion to dismiss the claims asserted against them, pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P. Because this court concludes that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [against these defen-[2]dants] which

would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the motion to dismiss must be granted. -

I.

The first count of the Third Amended Complaint alleges a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The pertinent allegations of count one are that the "FAA has placed a middle marker on Parcel C [of which plaintiff alleges he is the owner] and an Instrument Landing System," Third Amended Complaint, ¶ 30; that "the United States government and the FAA have ousted the Plaintiff from possession of this land since 1964," ¶ 33; and that "the United States and the FAA have never compensated the Plaintiff for their use of Parcels A and C," ¶ 34. According to plaintiff, the instrument landing system was emplaced in 1960, ¶ 6, the middle marker in 1974, ¶ 7.

The statute of limitations for the Federal Tort Claims Act is 28 U.S.C. §2401(b), which provides in pertinent part that a tort claim against the United States will be barred unless "presented in writing to the appropriate Federal Agency within two years after such claim accrues. . . . " It is undisputed that plaintiff did not commence this action until 1981. Plaintiff does not allege that he filed any federal court action or agency claim before that time.

Plaintiff contends, however, that his claim is not time-[3]barred. That contention derives from plaintiff's reading of two cases, *United States v. Dickinson*, 331 U.S. 745 (1947), and *United States v. One 1961 Red Chevrolet*

Impala Sedan, 457 F.2d 1353 (5th Cir. 1972). This Court is not persuaded that either case cited is on point.

In *Dickinson*, the United States had constructed a dam, and as a result the plaintiff's land was periodically flooded. The dam was completed in 1936, the first flood occurred in 1937, more extensive flooding took place in 1938, and the plaintiff brought suit in 1943; a six-year statute of limitations was applicable. The Supreme Court held that the action was not time-barred. In *Dickinson*, the plaintiff argued that the Government's action was, before 1938, ambiguous: before the first flood occurred, there was no indication that a taking had occurred or would occur; and before the extensive flood of 1938, it was still uncertain that the Government's intrusion upon the plaintiff's land was sufficient to constitute a taking, or, assuming that there was a taking, it was too soon to determine the extent thereof. The *Dickinson* plaintiff argued, and the Supreme Court agreed, that it was not until 1938 that the fact and the extent of the taking were clear. As Justice Frankfurter, writing for the court, put it: "An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be[4] struck," *United States v. Dickinson, supra*, 331 U.S. at 749. In the case at bar, however, the Third amended Complaint can only be read as stating that the Government's alleged tort was complete in 1974. According to the complaint, the alleged tort was neither uncertain nor ambiguous at that time; its extent was apparent; and nothing is alleged to have happened between 1974 and 1981 that changed the nature or extent of the alleged tort.

In *One 1961 Red Chevrolet*, the Fifth Circuit held that, where a change of law creates a new right, a cause of action may, for limitation purposes, accrue at the time of that change of law rather than when the alleged wrong occurred. In the case at bar, however, plaintiff has not alleged any change in the general law. Rather, he has simply alleged that a prior adjudication of his rights with respect to the parcels in question occurred in 1980. Clearly, an application of law, albeit one that changes the legal relations between two parties, is not the same thing as a change in the law. Thus, *One 1961 Red Chevrolet* – which, at any rate, represents the law of a circuit other than our own – has no bearing on the case before this court today.

In short, count one of the Third Amended Complaint is barred by 28 U.S.C. § 2401(b) and is accordingly dismissed.

II.

In count three of the Third Amended Complaint, plaintiff alleges numerous violations of unspecified "Federal law," ¶¶ [5]40-46, 49-51, and some specific violations of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 *et seq.* Where violations of that Act are alleged, plaintiff claims the FAA was derelict in fulfilling its statutory obligations in dealing with the State of Connecticut, ¶¶ 47-48, 52-54.

The Government contends that a private right of action will not lie against it to compel fulfillment of such obligations. While this question has not yet been presented to the Court of Appeals for the Second Circuit,

those courts of appeals that have considered this issue have unanimously concluded that the "plain language," *Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1045 n. 13 (11th Cir. 1982), of 42 U.S.C. § 4602(a) precludes such a right. *See Fountain v. Metropolitan Atlanta Rapid Transit Authority, supra; Roth v. United States Department of Transportation*, 572 F.2d 183, 184 (9th Cir. 1978); *Rhodes v. City of Chicago*, 516 F.2d 1373, 1377-1378 (7th Cir. 1975); *Will-Tex Plastics Manufacturing, Inc. v. Department of Housing and Urban Development*, 345 F. Supp. 654 (E.D. Pa. 1972); *aff'd* 478 F.2d 1399 (3rd Cir. 1973). The exception cited by plaintiff as applicable where a plaintiff is a third-party beneficiary to a contract between federal and state governments is clearly without relevance here, where plaintiff has not claimed to be a third-party beneficiary – indeed, where such a claim would be contrary to the entire thrust of the complaint.[6]

Thus, count three of the Third Amended Complaint fails to state a claim for relief cognizable under 42 U.S.C. §§ 4601 *et seq.* and is accordingly dismissed.

III.

The federal defendants have also moved to dismiss count five of the third Amended Complaint. Count five concerns enforceability of a stipulation entered into by plaintiff and the State of Connecticut. It does not appear to this court that count five runs against the federal defendants, and therefore that portion of the federal defendants' motion to dismiss that attacks count five is denied as moot, without prejudice to renewal if it should

appear hereafter that plaintiff means count five to run against the federal defendants.

IV.

In summary, the federal defendants' motion to dismiss the Third Amended Complaint insofar as it states claims against them is granted with respect to count one, granted with respect to count three, and denied as moot with respect to count five, without prejudice to renewal. Counts two and four of the Third Amended Complaint do not state claims against any of the federal defendants.

It is so ordered.

Dated at Hartford, Connecticut, this 7th day of February,[7] 1983.

JOSE A. CABRANES
United States District Judge

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE RALPH K. WINTER
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

– against –

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, ET AL.
Defendants-Appellees.

No. 83-6043

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the

judgment of said District Court be and it hereby is dismissed for lack of jurisdiction.

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport in Connecticut that has been going on between appellant and the governments of the United States and Connecticut for many years. The third amended complaint in the instant case against various federal and state defendants was filed in November 1982. In an opinion dated February 7, 1983, Judge Jose A. Cabranes dismissed all the counts that he found to be directed against the federal defendants, finding that count one was barred by the applicable statute of limitations and that count three failed to state a claim for relief.

2. Because the claims against the state defendants are still pending before the district court, the dismissal of the claims against the federal defendants is not a final judgment, and cannot be appealed, unless the district court determines that "there is no just reason for delay" and expressly directs the entry of a final judgment. Fed. R. Civ. P. 54(b). Judge Cabranes did not to do so in his opinion of February 7. This court is therefore without jurisdiction to hear this appeal, which is dismissed without prejudice. Appellant may seek the entry of final judgment as to the federal defendants in the district court, or he may await the final determination of his remaining claims before appealing all claims to this court.

3. Shortly before oral argument, appellant also moved in this court for a preliminary injunction "against project applications for airport development." The relief sought is the "withholding of federal funds for all airport

development at Bradley International Airport per 49 USC 1716(c) until such time as clear title to 'clear zone' is fully and adequately required." Judge Cabranes denied a request for similar relief in the district court on May 16, 1983, on the ground that relief was sought against the federal defendants only, as to whom the complaint had already been dismissed. In view of our disposition of the main appeal, this motion is also remanded without prejudice to the district court so that when a final judgment is entered, the entire matter may be addressed by this court at the same time.

WILFRED FEINBERG, *Chief Judge*

HENRY J. FRIENDLY
RALPH K. WINTER, *Circuit Judges.*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

HORACE B. WETHERELL, Director of Aeronautics; DONALD J. LYNCH, Deputy Director of Aeronautics; FRANK C. PARIZEK, EDWARD J. COADY, KINGSLEY GILLESPIE, HUGH C. CURRAN, ARTHUR SACHS and E. DONALD WALSH, The Aeronautics Commission of Connecticut; and HERBERT A. PREISSNER, Manager of Bradley International Airport

Civil No. 14,806

RULING ON DEFENDANTS' MOTIONS TO DISMISS AND TO DISCHARGE ATTACHMENTS

The plaintiff, Augustus J. Simmons, has brought suit under the Civil Rights Act, 42 U.S.C. § 1983, to seek redress against several public officials for two alleged wrongs done to him under color of state law. Jurisdiction is sought under 28 U.S.C. § 1343(3). He complains that certain of his property, principally land abutting a state airport, was taken by the defendants in violation of state law and in violation of the fifth amendment to the United States Constitution;[1] and he complains that the defendants caused him to be illegally arrested, prosecuted and convicted in the state court in violation of his federal civil rights, for cutting through a fence which the defendants

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[1] The fifth amendment to the United States Constitution provides in pertinent part:

" . . . nor shall private property be taken for public use, without just compensation."

had erected surrounding his property. The defendants have moved to dismiss the complaint on the grounds of sovereign immunity, lack of federal jurisdiction over the subject matter of the complaint, and the tolling of the statute of limitations.

I.

This case has a long and acrimonious history. Taking the facts as stated in the complaint, for purposes of the motion to dismiss, the plaintiff owns about twelve acres of land abutting Bradley International Airport in East Granby, Connecticut. His predecessor in title was his mother, who owned the land when the controversy at the root of this lawsuit began in 1961. At that time, the state Aeronautics Commission began condemnation proceedings against the land under Conn. Gen. Stats. § 15-79 (repealed by 1969 Public Act 768, § 263), which provided in pertinent part:

> "The state or any municipality, or any two or more municipalities jointly, . . . may take any such land or interest therein for such establishment (of an airport) or for the expansion or improvement of an airport when, in the opinion of the (state aeronautics) commission, public convenience or safety requires, and when the approval of the municipality or municipalities in which such land is located has been legally obtained, upon paying just compensation to the owner of such land or interest therein. . . . "

In December 1964 the plaintiff began construction of a restaurant on his land; construction was halted after the foundation had been completed, when the defendants

obtained an injunction against further construction on March 3, 1965, on the ground of the pendency of condemnation proceedings.

Although the defendants, acting for the Department of Aeronautics, were successful at trial on the issue of whether the Aeronautics Commission's decision to take the property was unreasonable or in bad faith, the Connecticut Supreme Court, without considering any other assignments or error, ordered a new trial solely on the ground that error was committed in an evidentiary ruling. *State v. Simmons,* 153 Conn. 351 (1966). At the new trial, the judge ruled that the taking was invalid since the defendants had failed to obtain the approval of the Town of East Granby, as required by Conn. Gen. Stats. § 15-79, *supra*. This decision was affirmed by the Connecticut Supreme Court. *State v. Simmons,* 155 Conn. 502 (1967).

Persisting after these two aborted attempts, on January 9, 1968, the defendants again began condemnation proceedings, this time under Conn. Gen. Stats. § 48-12, the state's general condemnation statute. The plaintiff acknowledges in his complaint that "(t)he effect of this statute was to vest title to the land in the State immediately upon the filing of the statement of condemnation in the Superior Court. . . . " In March 1971 the Connecticut Supreme Court again held the taking illegal, on the ground that takings by the Aeronautics Commission were authorized only by Conn. Gen. Stats. § 15-79, and that the commission could not employ § 48-12. *Simmons v. State,* 160 Conn. 492 (1971).

In August 1968 after the defendants had begun the action under § 48-12 but before the Connecticut Supreme

Court had declared this proceeding invalid, "the defendants caused the plaintiff to be arrested and charged with a criminal offense for cutting a wire fence erected by the defendants around the plaintiff's property. The plaintiff was convicted and sentenced to six months, execution suspended after three months, plus a fine of $250.00."

The plaintiff also alleges that in April 1968 the defendants caused agents or employees of the Department of Aeronautics to remove certain cinder blocks from his property, which they have refused to return to the plaintiff and for which they have paid him no compensation.

The plaintiff also alleges that the defendants caused certain runway lights to be constructed on his property, which are in use at present and for which he has received no compensation.

In the 1969 session of the state General Assembly, the plaintiff was the beneficiary of the following special act:

"AN ACT AUTHORIZING AUGUSTUS
J. SIMMONS
TO SUE THE STATE

> Augustus J. Simmons of Windsor is authorized to bring an action at law against the state not later than the first Tuesday of January, 1970, and to recover such damages as may be awarded to him by said court for loss of use of land owned by him in the town of East Granby. Any action brought in accordance with this act shall be brought to the superior court for Hartford county and no costs or interests shall be included in any judgment against the state. Approved May 28, 1969." Special Act No. 170.

Under this waiver of sovereign immunity, the plaintiff brought suit on January 5, 1970, against the defendants Lynch and Wetherell, and against the state of Connecticut, in the Superior Court for Hartford County, Docket No. 163, 875, seeking damages for the losses he allegedly sustained because of the deprivation of the use of his land for several years. The allegations of that complaint are quite similar to those here, except that the plaintiff does not seek redress for his allegedly illegal arrest and imprisonment.

II.

THE CRIMINAL PROSECUTION

The plaintiff seeks damages for his allegedly illegal arrest and conviction, which he claims were "caused" by the defendants. The court is of the opinion that he has failed to state a federal claim upon which relief may be granted.

The plaintiff acknowledges that he was convicted in a state court for cutting a fence erected by the defendants. He may not collaterally attack that conviction here, in the guise of a civil rights complaint. *Goss v. Illinois*, 312 F.2d 257 (7th Cir. 1963). See also, *Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970).

Further, his complaint fails to allege that the defendants acted in bad faith; he acknowledges that at the time of the arrest, title to the property had vested, albeit temporarily, in the state, under Conn. Gen. Stats. § 48-12. Public officials are not liable to actions for damages under § 1983 for actions taken in good faith. See *Pierson v.*

Ray, 386 U.S. 547 (1967); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, ___ F.2d ___ (2d Cir. Mar. 8, 1972), slip op. at 2024. The failure to allege lack of good faith provides an additional ground for dismissal, for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

III.

WRONGFUL TAKING

The plaintiff's contention that his property was taken without just compensation alleges the deprivation of a constitutional right, and thus is a basis for federal jurisdiction under 28 U.S.C. § 1343(3). *Lynch v. Household Fin. Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972).

The court is of the opinion, however, that since the plaintiff merely seeks damages for interference with the use of his property, he does not contend that a taking has occurred within the meaning of the fifth and fourteenth amendments to the United States Constitution.[2] Hence, the complaint must be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

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[2] The court assumes that the protection provided by the fifth amendment against the taking of property without just compensation applies to actions by state officials, through the due process clause of the fourteenth amendment, which provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

See *Haczela v. City of Bridgeport*, 299 F. Supp. 712 (D. Conn. 1969); cf. *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964).

Not every interference with the use of property constitutes a taking within the meaning of the fifth amendment:

> "Where the line of demarcation between acts which amount to the taking of an interest in property short of a transfer of title, as distinguished from acts resulting only in tortious interference with a plaintiff's rights in his property, is drawn in a case such as is presented here, requires a determination of whether
>
> > 'the action of the Government has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same. United States v. Lynah, 188 U.S. 445, 23 S. Ct. 349, 47 L.Ed. 539; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329, 43 S. Ct. 135, 67 L.Ed. 287; United States v. Causby, 328 U.S. 256, 66 S. Ct. 896, 90 L.Ed. 1004; United States v. Virginia Electric & Power Co., 365 U.S. 624, 81 S. Ct. 784, 5 L.Ed.2d 838.' Foster v. Herley, 330 F.2d 87, 90 (6th Cir. 1964).
>
> "The conceptual difference between acts of interference with the use and enjoyment of a person's property by public officials which results only in a claim for damages, and those continuing acts which under all the circumstances ripen into a taking by the government of an interest in the property was discussed in Foster v. Herley, supra. A medley of continuing official acts may develop into so much interference with the owner's use and enjoyment of his property as to justify a finding that it was taken in advance of the formal transfer of title." *Jimmie's, Inc. v. West Haven*, Civ. No. 13,503 (D.

Conn. Mar. 16, 1970), *aff'd.* 436 F.2d 1339 (2d Cir. 1971).

The plaintiff in his prayer for relief seeks an injunction against further attempts by the defendants to take his property "until such time as appropriate constitutional standards are established governing the taking of land for airport purposes," damages for the deprivation of use of his land, and an injunction against the use of the runway lights which allegedly have been erected on his land "unless adequate compensation is paid to the plaintiff for the right to maintain said lights. . . . "

The plaintiff's prayer for relief is inconsistent with the theory that there has been a constructive taking by the state; indeed, he fervently resists the implication that he recognizes any "servitude" imposed on his property by the defendants. He does not want any interest in his property to be taken.

Although the plaintiff conceivably could have argued that the erection of runway lights on his property resulted in a taking of that portion of his property on which the lights are situated, so that upon payment of compensation, title to that portion of his land would vest in the state, he has not chosen to do so. Rather, he seeks to have the use of the lights enjoined "unless adequate compensation is paid to the plaintiff for the *right to maintain said lights*. . . . " (Emphasis added). This theory of the case does not comport with a federal claim, since no taking in the constitutional sense is alleged. *Jimmie's, Inc. v. West Haven, supra. Contra, Inmobiliaria Borinquen, Inc. v. Garcia Santiago,* 295 F. Supp. 203 (D. P.R. 1969). It is quite

obvious that throughout this vigorously contested litigation in the state courts the defendants have continuously, although seemingly ineptly, made repeated attempts to pay the plaintiff "adequate compensation." It is equally clear that the plaintiff has continuously resisted those attempts and refused to accept "adequate compensation." What has resulted from the failure of the defnedants [sic] to employ the correct procedures to effect a taking of the plaintiff's property is a trespass on his land. It would be paradoxical to now treat the case in this court as a condemnation case. The plaintiff's claim gives rise to an ordinary action in tort for the recovery of damages, not a constitutional claim for "adequate compensation" for a taking under the power of eminent domain.

Nor is federal jurisdiction provided by the plaintiff's claim that he was deprived of his property without due process of law, in violation of the fourteenth amendment to the United States Constitution. The record of success which the plaintiff has achieved in the state courts, by his vigorous efforts to resist the taking of his land by the state officials, shows clearly that he has been afforded adequate due process of law.

In the context of this case, it is also clear that the dispute concerning the concrete blocks, which the plaintiff alleges were removed from his land by agents of the defendants and taken to airport property, is more properly viewed as a question of who holds title to this property, rather than a question of whether property has been taken without just compensation. In this posture, there is no federal claim with respect to the concrete blocks.

The plaintiff's one remaining claim is that:

> "The alleged standards and criteria applied to justify condemnation of the plaintiff's land were not uniformly applied to other abuttors, including the abutting land owned by the State of Connecticut, and thus the plaintiff was denied the equal protection of the laws in violation of the FOURTEENTH AMENDMENT to the United States Constitution."

Plaintiff here attacks the "sound exercise of discretionary authority," *Barr v. Mateo*, 360 U.S. 564, 575 (1959), of the state officials, in their decision to attempt to take his land rather than another's. Sovereign immunity bars such an attack. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.*

The defendants' motion to dismiss is granted, on the ground that the plaintiff has failed to state a claim upon which relief may be granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 3rd day of April, 1972.

M. JOSEPH BLUMENFELD
Chief Judge

APPENDIX N

SIMMONS v. WETHERELL
Cite as 472 F.2d 509 (1973)

AUGUSTUS J. SIMMONS,

Plaintiff-Appellant,

v.

HORACE B. WETHERELL, as the Director of Aeronautics, et al.,

Defendants-Appellees.

No. 130, Docket 72-1541.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1972.
Decided Jan. 19, 1973.

Landowner brought civil rights action against state authorities alleging that his property had been taken without due compensation. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, dismissed, and the landowner appealed. The Court of Appeals, Smith, Circuit Judge, held that where state authorities had proceeded with reasonable speed in their attempts to condemn landowner's efforts at defeating condemnation in state courts, the attempts at condemnation constituted, at most, tortious interference with landowner's property rights and landowner could not maintain a civil rights action arising from the condemnation proceedings, but that landowner's allegations that state had fenced off and put

airport runway lights on portion of property owned by landowner without paying him due compensation or instituting court proceedings stated cause of action for deprivation of landowner's right to enjoy the use of his land; however, resolution of that portion of his complaint would be stayed pending action in state court involving the matter.

Affirmed in part and remanded in part.

1. CIVIL RIGHTS at 13.4(1)

Attempts by state authorities to condemn landowner's property constituted, at most, tortious interference with landowner's property rights and, therefore, landowner could not maintain action against state authorities under statute pertaining to the deprivation of rights secured by the Constitution, where state officials had proceeded with reasonable speed in their attempts to condemn land and any delay arose largely from landowner's efforts at defeating the condemnation in the courts. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

2. COURTS at 303(2)

Appropriate forum for assertion of landowner's tort claim against state authorities based upon effects of apparent ineptitude in condemning landowner's property was in state court. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

3. CIVIL RIGHTS at 13.4(1)

Actions of state authorities in attempting to condemn landowner's property did not constitute a "taking" within ambit of statute pertaining to the deprivation of rights secured by the Constitution. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. ACTION at 69(5)
CIVIL RIGHTS at 13.12(3)

Landowner's allegations that state had fenced off land owned by him and had put airport runway lights on it without paying him due compensation or instituting court proceedings were sufficient to state civil rights claim for deprivation of landowner's right to enjoy the use of his land; however, where landowner's claim against state authorities revolved around boundary dispute forming basis of landowner's pending suit in state court, landowner's civil rights action would be stayed pending resolution of the state court action in interest of comity and efficient judicial administration. 42 U.S.C.A. § 1983.

Stephen W. Silverman, Springfield, Mass., for appellant.

S. Victor Feingold, Asst. Atty. Gen. (Robert K. Killian, Atty. Gen. of the State of Connecticut, Clement J. Kichuk, Asst. Atty. Gen., of counsel), for appellees.

Before LUMBARD, SMITH and MANSFIELD, Circuit Judges.

SMITH, Circuit Judge:

This case represents the federal stage of a long-standing and acrimonious court battle between the Simmons family of East Granby, Connectcut [sic] and state officials over the latters' attempts to condemn some land adjoining Bradley International Airport. Augustus J. Simmons now appeals from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief. Judge, dismissing his § 1983 action against the named state officials for failure to state a claim upon which relief can be granted. We affirm the bulk of Judge Blumenfeld's decision; however, as to one aspect of this suit, we remand, for the reasons outlined below.

The battle here began when the state aeronautics commission moved under Conn. Gen. Stat. § 15-79, which then governed taking of land for airports,[1] to condemn the Simmons property. Pursuant to the statute, a petition for the determination of compensation was brought by the state in Hartford Superior Court; a judgment was rendered finding the taking reasonable and appointing a referee to assess damages. Anastasia Simmons (appellant's mother), appealed to the Connecticut Supreme Court, which reversed, finding error in the trial court's exclusion of evidence offered to show that property similarly situated had not been taken. State v. Simmons, 153 Conn. 351, 216 A.2d 632 (1966). Since this evidence was

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[1] § 15-79 was repealed by Public Act 768, § 263 (1969).

held to be relevant on the issue of whether the state had acted arbitrarily in singling out the Simmons land, the case was remanded for a new trial.

While the first suit was pending, Mrs. Simmons died, and Augustus entered the fray.[2] Before the second trial began, he raised as an affirmative defense to the taking the fact that the state authorities had not received the requisite statutory approval from the Town of East Granby before proceeding with the condemnation. The trial court agreed; the Supreme Court affirmed. State v. Simmons, 155 Conn. 502, 234 A.2d 835 (1967). Round two for the Simmons family.

Undaunted, the state tried again, this time attempting to use Conn. Gen. Stat. § 48-12, the general condemnation statute, which provided for procedures different from § 15-79 in cases where compensation could not be agreed upon by the parties. The Simmons family prevailed again, in Simmons v. State, 160 Conn. 492, 280 A.2d 351 (1971), when the Supreme Court held that the state was required to use the § 15-79 procedure.

At about the same time the abortive condemnation attempts were taking place, a related dispute arose between the state and Simmons over some land upon which runway lights had been placed. Simmons claimed that the land was his; the state said that it was the state's. An ejectment action followed. In Simmons v. Parizek, 158 Conn. 304, 259 A.2d 642 (1969), the Supreme Court held

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[2] Even Augustus' succession to the land did not escape the scrutiny of the Connecticut courts. *See* Simmons v. McKone, 158 Conn. 71, 255 a.2d 822 (1969).

that since the complaint did not allege that the state officials had acted unconstitutionally or in a manner unauthorized by statute, the suit was barred by the doctrine of sovereign immunity. Appellant took the hint, and on October 14, 1969 resurrected the ejectment action, this time alleging that the taking of the land and the erection of runway lights was done both unconstitutionally and without statutory authorization. That suit, Docket No. 162923, Hartford Superior Court, is still pending.

Shortly before the Connecticut Supreme Court decision in Simmons v. Parizek, *supra*, a Special Act was passed by the Connecticut General Assembly, allowing Augustus Simmons to sue the state for damages over "loss of use of land," arising out of the bumbling condemnation proceedings. On January 5, 1970, Simmons brought such a suit, Docket No. 163875, Hartford Superior Court; the action is still pending.

Thus, if there ever was a litigant who knew that his claims would be fairly heard in the state courts, Augustus Simmons was he. Nevertheless, perhaps for a change of setting, he instituted this § 1983 action on December 22, 1971, alleging that his property was taken without due compensation, and seeking damages. Since the complaint alleged deprivation of property rights through the state action, jurisdiction was correctly predicated upon 28 U.S.C. § 1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

[1] As Judge Blumenfeld recognized, the basic question presented by this suit is whether the attempts at condemnation amount to an unconstitutional taking, or

whether they simply constitute at most tortious interference by the state officials with Simmons' property rights. Judge Blumenfeld found that the latter situation was presented by the attempts at condemnation here; we agree.

Simmons relies heavily upon such cases as Foster v. Detroit, 405 F.2d 138 (6th Cir. 1968); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964); and Inmobiliaria Borinquen, Inc. v. Santiago, 295 F. Supp. 203 (D. P.R. 1969), for the proposition that government misuse of the condemnation power can support a § 1983 action. While we have no quarrel with the general proposition, this case is readily distinguishable from the ones cited. In each of those instances, the state officials had begun condemnation proceedings and then let them pend, or had announced redevelopment plans and never brought them to fruition. The result was the "freezing" of the plaintiff's use of his property, and the courts found enough of a taking to state a cause of action under § 1983.

Here, however, the state officials proceeded with reasonable speed, if not efficiency, every time they sought to condemn the land. Each effort at condemnation was accompanied by a prompt resort to the judicial process to perfect the taking; each time, Simmons fought the action, and eventually prevailed. In the cited cases, the damage arose from the state's inexcusable delay in finalizing its eminent domain planning; here any delay arises largely from Simmons' efforts at defeating the condemnation in the courts. In the cited cases, the crux of the problem was official inaction; here, the state has repeatedly tried to condemn the land and pay Simmons just compensation. While Simmons certainly should not be censured for

asserting his rights, neither should state officials be forced to await the natural delays of litigation at their peril, particularly when the issues involved are narrow ones of statutory construction.

[2, 3] This is not to say that Simmons may not have a valid tort claim based upon the effects of the state's apparent ineptitude here. But the appropriate forum for the assertion of such a claim is the state court, where Simmons now has an action, brought pursuant to the waiver of immunity in the 1969 Special Act, pending. Whatever else the state's actions here amounted to, they did not constitute a taking within the ambit of § 1983. *See* Jimmie's, Inc. v. City of West Haven, 436 F.2d 1339 (2d Cir.), cert. denied, 403 U.S. 931, 91 S. Ct. 2254, 29 l.Ed.2d 710 (1971).

[4] Thus, as to the condemnation attempts, we affirm the judgment below. The allegations about the land upon which the runway lights are placed, however, stand on a somewhat different footing. At least at this stage of the proceedings, we must accept Simmons' claim that he owns the land, and that the state had fenced it off and put runway lights on it. Assuming all that to be true, we are unable to conclude that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). If the land is in fact Simmons', and the state indeed has fenced it off without paying him due compensation or instituting court proceedings, it would seem that a deprivation of appellant's right to "enjoy" the use of his land is stated. *See Lynch, supra,* 405 U.S. at 544, S. Ct. 1113.

However, as Judge Blumenfeld properly recognized, the taking claim here really revolves around a boundary dispute. It is that same dispute that forms the basis of Simmons' pending suit, Docket No. 162923, in Hartford Superior Court. The resolution of boundary disputes is a matter traditionally within the purview of the state courts; the final decision there will undoubtedly control Simmons' claims here. Thus, while we find a cause of action stated with respect to the land upon which runway lights are placed, and remand, the district court should stay its hand here pending the resolution of the state court action, both in the interests of comity and efficient judicial administration. *See* Klein v. Walston & Co., 432 F.2d 936 (2d Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (L. Jan, J.)

We have considered appellant's other claims including those based upon an alleged false arrest and imprisonment, and find them without merit. We affirm the judgment below in part and remand in part for disposition not inconsistent with this opinion.

APPENDIX O

Federal Register **Presidential Documents**

Vol. 50. No. 43

Tuesday,
March 5, 1985

Title 3 –

The President

Memorandum of February 27, 1985

Memorandum for the Heads of Executive Departments and Agencies.

The purpose of this Memorandum is to improve administration and implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Specifically, I hereby direct the following actions:

1. The President Memorandum of September 6, 1973 on this subject is superseded.

2. As with other Administration management improvement initiatives, a lead agency, the Department of Transportation (DOT), is designated to coordinate and monitor implementation of the Act, and consult periodically with State and local governments and other organizations and interest groups affected by administration of the Act.

3. DOT, jointly with the Department of Housing and Urban Development, shall interact with the principal executive departments and agencies affected by the Act in developing Administration policy.

4. Within 90 days of the date of this Memorandum, all affected executive departments and agencies shall propose common regulations under the Act. Within one year of the date of this Memorandum, such departments and agencies shall issue common regulations under the Act. Such regulations shall be consistent with the model policy promulgated by DOT, in consultation and coordination with other affected agencies, and published in final form in the **Federal Register** simultaneously with this Memorandum.

5. DOT shall report annually to the President's Council on Management Improvement, through the Office of Management and Budget, on implementation of the Act.

/s/ Ronald Reagan

THE WHITE HOUSE,
Washington, February 27, 1985

[FR Doc. 85-5298
Filed 2-28-85; 4:14 pm]
Billing code 3195-01-M

APPENDIX P

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

NEW ENGLAND REGION
12 NEW ENGLAND EXECUTIVE PARK
BURLINGTON, MA 01803

Lease No.: DOT-FA74NE-0369
BRADLEY INTERNATIONAL
ILS-ALS R/W6

LEASE

between
STATE OF CONNECTICUT
DEPARTMENT OF TRANSPORTATION

and

THE UNITED STATES OF AMERICA

This LEASE, made and entered into this first day of June in the year one thousand nine hundred and seventy four by and between the State of Connecticut, Department of Transportation whose address is 24 Wolcott Hill, Wethersfield, Connecticut, 06109 for itself and its heirs, executors, administrators, successors, and assigns, hereinafter called the lessor, and the UNITED STATES OF AMERICA, hereinafter called the Government:

WITNESSETH: The parties hereto for the consideration hereinafter mentioned covenant and agree as follows:

1. For the term beginning June 1, 1974 and ending June 30, 1974, the lessor hereby leases to the Government the following described property, hereinafter called the premises, viz:

As contained in Exhibit I attached hereto and made a part hereof.

* * *

9. The Lessor grants to the Government the right to utilize any existing power lines, control lines, conduits, or other facilities of the Lessor which are adaptable to use in connection with the purpose of this covenant.

10. The Lessor hereby warrants that it has acquired and possesses an adequate real estate right in the property described herein, and that it is authorized to grant to the Government the rights and interests set forth herein.

11. The right of ingress and egress and the right of way herein granted shall insure to the benefits of the Government and its duly authorized agents, representative, contractors and employees.

12. The Lessor agrees not to erect or to allow to be erected on the property leased hereby or on adjacent property of the Lessor, any structure or obstruction of whatsoever kind of nature as will interfere with the proper operation of the facilities to be installed by the Government under the terms of this Lease unless consent thereto shall first be secured from the Government in writing. Further, in order to insure the continuing proper operation of the ALS Facility, the Lessor shall prevent the erection of any structure, or the natural growth of trees, brush that will cause that structure or natural gro vth to:

(a) protrude an area hereinafter referred to as the light plane. For obstruction clearance purposes this light plane is defined as rectangular in shape, 400 feet wide and symmetrically located about the ALS centerline;

it shall start at the landing threshold and extend 200 feet beyond the approach end of the system.

(b) prevent a clear line of sight to all lights of the system from any point on a surface, one-half degree below the glide path and extending 250 feet each side of the centerline, up to 1600 feet in advance of the outermost light in the system.

13. In order to insure the continuing proper operation of the Instrument Landing System(s), the Lessor agrees that certain critical and no-parking areas, which are shown on the attached Drawing No. 1-A-3076, shall be established in the vicinity of the localizer and glide slope facilities.

Where the critical areas lie within the bounds of the Airport, the Lessor agrees not to erect or allow to be erected any structure of any kind or nature nor to perform or allow to be performed any excavating, grading or planting operations within these areas, without the prior concurrence of the government. Where the critical areas lie outside the bounds of the Airport, the Lessor agrees to extend every effort to negotiate agreements with the property owners involved covering these restrictions.

In the event of natural erosion, the Lessor agrees to perform corrective grading, planting and excavation within the critical area. Such work shall be accomplished during a period which is mutually agreeable to both Lessor and Lessee.

Where the critical and no-parking areas lie within the bounds of the Airport, the Lessor agrees not to permit the presence of parked aircraft, vehicles or equipment within

the critical and no-parking areas, or of free moving aircraft or vehicles within the critical areas which are not under the control of tower personnel when the facilities are in operation. The Lessor agrees to provide and maintain no-parking signs within these areas, when required.

Where the critical and no-parking areas lie outside the bounds of the Airport, the Lessor agrees to extend every effort to negotiate agreements with the property owners involved granting the Lessor the right to establish and maintain no-parking signs on their properties within these areas.

The Lessor further agrees to provide and maintain markings as required, on all paved areas to delineate the limits of the critical area.

14. The Government waives the requirement for radio control of traffic in the vicinity of Runway 6 Localizer on the North Perimeter Road.

15. For and in consideration of the benefit to the Bradley International Airport and the general public using same, the Lessor agrees to and grants to the government all terms and conditions stated herein at no cost.

16. This lease will supersede License DOT-FA73NE-0308 on commissioning of the CAT-II ILS system.

17. The Lessor further agrees that in the event that relocation or modification of the FAA's facilities associated with air navigation or components thereof hereinbefore described is made necessary by airport improvements or changes made or caused to be made by the airport owner (the term "airport owner" used herein refers to the political subdivision or other competent

authority responsible for the airport operation and capital improvements), the costs of such relocation or modification shall be chargeable to the Lessor; that the Government shall have the exclusive right to determine how the relocation or modification project shall be accomplished including, but not limited to, the engineering, site selection, procurement of equipment; construction, installation, testing, flight inspection and recommissioning of the facility; that upon submission by the Government of an estimate of the relocation or modification costs, the Lessor shall transfer to the Government the funds required for the relocation or modification; that in the event the actual costs of relocation or modification exceed the estimate submitted by the Government the Lessor shall pay only the actual costs; that the Government shall have the exclusive right to determine when a relocation or modification of a facility or component thereof has been made necessary by airport improvements or changes made or caused to be made by the airport owner, and that this decision shall be final. It is agreed by and between the Lessor and the Government that in the event the actual costs of relocation or modification of a facility or component thereof is less that the estimate submitted by the Government the Lessor shall pay only the actual costs.

18. The following changes were made to this Lease prior to execution:

a. Deletion of certain wording in paragraph 2.

b. Deletion of paragraph 3 in its entirety.

c. Addition of certain wording in paragraph 7.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names as of the date indicated.

WITNESSES

/s/ Sandra L. Barone

/s/ Madeline P. Makiaria

/s/ George J. Bates

/s/ Susan R. Pitt

STATE OF CONNECTICUT
DEPARTMENT OF
TRANSPORTATION

By /s/ Joseph B. Burns
(Seal)
Joseph B. Burns
Commissioner

Date: June 11, 1974

UNITED STATE [sic]
OF AMERICA
DEPARTMENT OF
TRANSPORTATION

By /s/ Roland O. Bisson Jr
(Seal)

Date: May 24, 1974

This Agreement is made with the approval of the undersigned, under the provisions of Section 13b-42(b) of the General Statutes of Connecticut, as revised.

/s/ C. Pierre Phillips
Deputy Attorney
General
State of Connecticut

Date: JUL 26 1974

/s/ Gerald J. Nelson
Deputy Commissioner
of Finance and
Control
State of Connecticut

Date: 6/25/74